Supreme Court, U.S.
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No. 88-1740

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ARNOLD JEROME KARZOV,

Petitioner,

vs.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioner has failed to invoke federal jurisdiction pursuant to 28 U.S.C. § 1257(3).

II. Whether the inherent authority of the Supreme Court of Illinois to impose differing sanctions upon disciplined attorneys depending on the unique facts of each case contravenes the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

III. Whether the procedure employed by the Supreme Court of Illinois imposing discipline on Petitioner for his violation of long-established ethical principles violated the Due Process requirement of the United States Constitution.

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CONSTITUTIONAL PROVISIONS INVOLVED

Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal Protection of laws. U.S. CONST. amend. XIV.

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. 28 U.S.C. § 1257.

RULES OF THE SUPREME COURT OF ILLINOIS AND ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION INVOLVED

Supreme Court Rule 7-110. Relationship with Officials. (1980)

(a) A lawyer shall not give or lend any thing of value to a judge, official, or employee of a tribunal, except that a lawyer may make a

contribution to the campaign fund of a candidate for such office.

Supreme Court Rule 7-110(a). Relationship with Officials. (Amended 1988)

"(a) A lawyer shall not give or lend any thing of value to a judge, official, or employee of a tribunal except those gifts or loans which a judge or a member of his family may receive under Rule 65(c)(4) of the Code of Judicial Conduct, except that a lawyer may make a contribution to the campaign fund of a candidate for such office."

Supreme Court Rule 65(c)(4). A Judge Should Regulate His Extrajudicial Activities To Minimize The Risk Of Conflict With His Judicial Duties.

(4) Neither a judge nor a member of his family residing in his household should accept a gift, bequest, favor, or loan from anyone except as follows:

(a) a judge may accept a gift incident to a public testimonial to him; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and his spouse to attend a bar-related law function or activity devoted to the improvement of the legal system, or the administration of justice;

(b) a judge or member of his family residing in his household may accept ordinary social hospitality; a gift, bequest, favor or loan from a relative; a wedding or

engagement gift; loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) a judge or a member of his family residing in his household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before him, including lawyers who practice or have practiced before the judge.

Supreme Court Rule 771. Types Of Discipline.

(a) disbarment;
(b) disbarment of consent;
(c) suspension for a specified period and until further order of court;
(d) suspension for a specified period of time;
(e) suspension until further order of the court;
(f) suspension for a specified period of time or until further order of the court with probation; or
(g) censure.

INTRODUCTION

For the sake of brevity, Respondent will not include sections in this brief for opinion below, jurisdiction, and statement of the case. Respondent will address in

Argument those portions of Petitioner's brief which Respondent considers inaccurate or inadequate.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari to the Supreme Court of Illinois should be denied for the following reasons:

First, Petitioner has failed to invoke federal jurisdiction pursuant to 28 U.S.C. § 1257(3). Petitioner did not raise any federal constitutional claim until filing a petition for rehearing before the Supreme Court of Illinois. Petitioner has not demonstrated that he fits within any exception as he had reason to expect that the Court would decide the case as it did.

Second, Petitioner's right to equal protection was not contravened because the Court did not make Petitioner's sanction exactly the same as others who were found to violate the same disciplinary rule. Such flexibility is crucial to achieve the ultimate goals of the disciplinary system. The only issue in fact raised by this petition is an issue of state law, which the Illinois Supreme Court has already decided. Furthermore, disparate sentencing is not a proper basis for certiorari jurisdiction.

Third, Petitioner was not denied due process of law during the course of the disciplinary proceedings

against him. Petitioner received notice of the charge and an opportunity to defend in complete compliance with the due process requirements as mandated in In re Ruffalo, 390 U.S. 544 (1968).

ARGUMENT

I. Petitioner has failed to invoke federal jurisdiction pursuant to 28 U.S.C. § 1257(3).

Petitioner is required to demonstrate in his petition that this Court has jurisdiction to review the judgment of the Supreme Court of Illinois. Petitioner has failed to do so.

Petitioner first raised his federal constitutional claims of a denial of equal protection and due process in his petition for rehearing after the judgment of the Supreme Court of Illinois. (Pet. App.B, 1b-10b).

Raising a federal question for the first time in a petition for rehearing addressed to the highest state court is generally insufficient to invoke federal jurisdiction unless the court actually entertains the petition and expressly decides the question. Consolidated Turnpike Co. v. Norfolk and Ocean View Rail- way Co., 228 U.S. 326, 334 (1913). As the Illinois Supreme Court denied the petition in the instant case without entertaining the federal question (Pet. App. C, 1c), the general rule precludes review by this Court. To constitute a reviewable judgment under such circumstances, the order denying the petition for rehearing must be more than a cursory recitation that the petition has been fully or maturely considered and is accordingly denied. Consolidated

View Railroad Co., 228 U.S. 326, 333-334 (1913).

In order to invoke the jurisdiction of this Court to review a constitutional claim not timely presented to the Supreme Court of Illinois, Petitioner must establish that his case fits within an exception. Great Northern Railway Co. v. Sunburst Oil and Refining Co., 287 U.S. 358, 367 (1932). Petitioner has not set forth any claim nor authority asserting that he fits within an exception. The only exception Petitioner could possibly claim is that the Illinois Supreme Court rendered an unexpected decision, giving him no prior opportunity to anticipate or assert his federal claim, and the petition for rehearing constitutes his first and only chance to present the matter

to that court. Brinkerhoff-Farris Trust Co. v. Hill, 281 U.S. 673, 677-78 (1930); Missouri Insurance Co. v. Gehner, 281 U.S. 313, 320 (1930). Petitioner clearly fails to meet this test. First, Illinois Supreme Court Rule 771 provides for types of discipline that may be imposed for professional misconduct, including disbarment. Second, the Administrator has urged disbarment as a sanction for Petitioner throughout Petitioner's entire disciplinary proceeding, and particularly before the Supreme Court of Illinois. (Pet. Br. p. 4). Thus, Petitioner cannot assert that the Court's decision was unexpected or a surprise. In fact, Petitioner's sanction was less than the amount of discipline sought by the Administrator.

II. The inherent authority of the Supreme Court of Illinois to impose differing sanctions upon disciplined attorneys depending on the unique facts of each case does not contravene the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

Lawyer discipline is within the inherent authority of the state courts. See Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975). Supervision of attorney conduct is one of the most crucial functions of the Supreme Court of Illinois. See In re Neff, 83 Ill.2d 20, 413 N.E.2d 1282, 1284 (1980).

Petitioner was suspended from the practice of law for eighteen months by the Supreme Court of Illinois for giving $1,000 in cash to Judge Reginald Holzer, a Cook County circuit court chancery judge whom

Petitioner appeared before regularly.

On the afternoon of December 20, 1982, Holzer called Petitioner to his chambers. Holzer told Petitioner he, the judge, was going on a vacation the following day, that he was short of funds, and that he needed $1,000 in cash. Petitioner went to his bank that same day, removed $1,000 from a safety deposit box, returned to Holzer's chambers and gave the judge the $1,000. No promissory note was signed, no rate of interest was discussed and no terms of repayment were set forth. Holzer eventually repaid Petitioner half of the loan but only after a federal criminal investigation into Holzer's conduct had begun.

Petitioner was suspended for violating Rule 7-110(a) of the

Illinois Code of Professional Responsibility as amended in an attorney disciplinary case, In re Corboy, et al., 124 Ill.2d 29, 528 N.E.2d 694 (1988). Prior to the rule's amendment, Illinois strictly prohibited all loans or gifts from lawyers to judges except for campaign contributions to designated judicial campaign committees. Id. at 699. In Corboy, Rule 7-110(a) was amended to permit lawyer gifts and loans to judges if judges could accept the items pursuant to state judicial ethics guidelines. Id. As a result of the amendment, lawyers are, among other things, explicitly permitted to make gifts and loans to judges if they constitute common social courtesies or if the gifts are between members of a family. Id. at 701.

In selecting the amount of attorney discipline to be imposed, the Illinois Supreme Court balances the need to be consistent with a consideration of the unique facts of the particular case. See In re Saladino, 71 Ill.2d 263, 375 N.E.2d 102 (1978). Based on the unique facts of this case, including Petitioner's testimony at his hearing and his admission to the Illinois Supreme Court that, while he resented Holzer's request for money, he agreed in order to avoid possible retaliation by Holzer against his clients in the future, the Court suspended Petitioner. In re Karzov, 126 Ill.2d 33, 533 N.E.2d 856 (1989).

Petitioner erroneously contends that differential and disparate sentencing in attorney disciplinary cases violates the Equal Protection

Clause of the Fourteenth Amendment of the United States Constitution. In furtherance of this misguided notion, Petitioner asserts that because exactly the same sanction was not imposed in seven attorney disciplinary cases involving Rule 7-110(a)[1], the Court embarked on

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1. In re Corboy et al., supra, (charges dismissed involving six attorneys who loaned money for the benefit of a judges mother. The Court found no improper motive was involved); In re Ketchum, 124 Ill.2d 50, 528 N.E.2d 689 (1988), (two-year suspension for making loans to a judge and soliciting a $1,000 contribution from the attorneys in Corboy, supra); In re Rothenberg, 127 Ill.2d 139 (1989), (one-year suspension for loans to Holzer); In re Powell, 126 Ill.2d 15, 533 N.E.2d 867 (1989), (disbarred for having a client post collateral for a bank loan for Judge Holzer whom the client had a case pending); In re D'Angelo, 126 Ill.2d 45, 533 N.E.2d 861 (1989), (disbarred for arranging car rentals for judges); In re Heller, 126 Ill.2d 94, 533 N.E.2d 824 (1988), (disbarred two attorneys for procuring bank loans for Judge Holzer, whom they practiced before regularly). In re

a spree of irreconcilable and irrational dispositions creating some sort of "crazy quilt" of decisions which contravene Equal Protection. A review of these cases clearly defeats Petitioner's argument. With the exception of Corboy, in which the Court specifically distinguishes facts and circumstances from other cases, substantial suspension or disbarment was imposed. Furthermore, Petitioner's eighteen month suspension falls within the range of imposed discipline.

Petitioner's basic underlying grievance is that he did not receive the same disciplinary sanction as certain attorneys in the Corboy case.

Karzov, 126 Ill.2d 33, 533 N.E.2d (1989), Instant Case. (Eighteen month suspension for $1,000 loan to judge Holzer).

In Corboy, six lawyers were found to have violated amended Rule 7-110(a). The Court declined, however, to impose sanctions upon them due to the unique facts surrounding their financial transactions.

This issue was specifically addressed by the Court, wherein the Court found "[Petitioner] was not motivated by charity or compassion for Holzer but by a desire to avoid adverse rulings in cases he anticipated having before the judge. (Cf. In re Corboy (1988), 124 Ill.2d 29, 39, 48, 49, 124 Ill.Dec. 6, 528 N.E.2d 694 (no findings of improper motives). Because [Petitioner's] motives in making the loan in this case were designed to influence Holzer in judicial decisions, we determine that substantial discipline is warranted." 533 N.E.2d at 860.

The Court was not required to make Petitioner's sanction consistent with others who were found to violate the same disciplinary rule. Final responsibility for determining discipline to be imposed on attorneys rests in the Supreme Court of Illinois. In determining the appropriate penalty, the Court may properly consider all facts and circumstances in aggravation and mitigation, including the attorney's actual conduct. See In re Neff, 83 Ill.2d 20, 413 N.E.2d 1282 (1980). Furthermore, this Court has rejected the notion that there is a constitutional right of proportionality of sanctions, even in criminal proceedings. See e.g., Pulley v. Harris, 465 U.S. 37 (1984). Even if it could be argued that a criminal defendant were entitled to

this type of proportionality, the concept should not apply to an attorney disciplinary proceeding. A disciplinary proceeding is simply not criminal in nature. In re Daley, 549 F.2d 469 (7th Cir. 1977) cert. denied 434 U.S. 829 (1977). Cf., In re Ruffalo, 390 U.S. 544 (1968). (Disciplinary proceedings, although sui generis, described as quasi-criminal).

Flexibility in imposing sanctions is neither arbitrary nor unconstitutional, but necessary to achieve the goal of safeguarding the public, maintaining the integrity of the profession and protecting the administration of justice. See Middlesex County Ethics Committee, etc. v. Garden State Bar Association, et. al., 457 U.S. 423, 434-35 (1982). To achieve fair results, the

disciplinary systems must be neither rigid nor mechanistic, but flexible enough to allow for the uniqueness of each case. See In re Leonard, 64 Ill.2d 398, 356 N.E.2d 62, 66 (1976). The Court must evaluate each situation independently because the circumstances of each case vary substantially and sanctions which are appropriate in one situation may be inappropriate in another even though the underlying offense is similar or even the same. See In re O'Hallaren, 64 Ill.2d 426, 356 N.E.2d 520, 523 (1976). The Illinois Court correctly applied these principles in deciding the proper sanction for Petitioner.

III. The Procedure employed by the Supreme Court of Illinois imposing discipline on Petitioner for his blatant violation of long-established ethical principles does not violate the Due Process requirement of the United States Constitution.

Petitioner argues that he was denied due process when the Illinois Court sua sponte amended Rule 7-110(a) in the Corboy case. His argument is meritless. In In re Ruffalo, 390 U.S. 544 (1967), this Court stated that an attorney in a disciplinary proceeding is entitled to due process to the extent that he receives notice of the charge and an opportunity to be heard. Id. at 550. Both requirements have been met. Respondent had notice that he was charged with making a proscribed loan to a judge. He was afforded ample opportunity to defend the charges and he did so in a vigorous manner.

Petitioner fails to understand that the Illinois Supreme Court did not retroactively apply a new standard to his conduct.

Petitioner's acts violated the former construction of Rule 7-110(a) as well as the new construction. In this case, Petitioner's actions were wrong under the prior disciplinary rule and wrong under the rule as amended. In that Petitioner knew that loans to judges were prohibited, he had more than fair warning that he could not engage in such activity.

In addition, Supreme Court Rule 771 provided Petitioner with sufficient notice that the state court had the authority to impose discipline ranging from censure to disbarment upon any finding of misconduct. 107 Ill.2d Rule 771. Thus the issue of appropriate sanction as raised by Petitioner is a matter of state law. No substantial federal questions exist.

In summary, the due process provision of the United States Constitution does not require a more exacting standard than that employed by the Supreme Court of Illinois. A clarification of a state ethics rule did not violate any equal protection or due process principles. Further, disparate sentencing is not a proper basis for certiorari jurisdiction.

CONCLUSION

For the reasons set forth above, Respondent respectfully submit the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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